No. 05-832

In The

Supreme Court of the United States

CHARLES R. ROBINSON, IV,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR REHEARING

Charles R. Robinson, IV
Pro'se Litigant
I.D. #11087-026
Federal Correctional
Institution
P.O. Box 5000
Greenville, IL., 62246

QUESTIONS PRESENTED

Whether a District Court may sua sponte dismiss an untimely petition where the Government has failed to raise a limitations defense.

whether rehearings in the United States Supreme Court are to be deemed empty formalities if the final action that this Court takes is the denial of a writ of certiorari.

whether pro'se litigants are to be held to the same standards as attorneys.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF JURISDICTION

This Court denied Petitioner's petition for writ of certiorari on Feb. 21, 2006.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and S.Ct. Rule 44 (2) regarding rehearings.

STATEMENT OF THE CASE

On March 14, 2003, Robinson filed with the District Court his Motion under Section 2255. The District Court had jurisdiction over Robinson's Motion pursuant to 28 U.S.C. § 1331. On October 27, 2003, the District Court denied Robinson's Motion, without a response from the Government, concluding that it was untimely and filed outside the one-year statute of limitations period set forth in Section 2255. The District Court raised the question of the timeliness of Robinson's Motion **sua sponte** and held that Robinson's conviction became final under Section 2255 on the date that this Court initially denied Robinson's petition for a writ of certiorari, October 1, 2001, (the "Initial Certiorari Denial"), even though Robinson filed a petition for rehearing that this Court did not deny until March 18, 2002 (the "Rehearing Denial"). The District Court determined that the filing of the petition for rehearing did not toll the finality of the conviction. Therefore, even though Robinson filed his Motion within one year of the Rehearing Denial, the District Court found it untimely because it was filed more than one year after the Initial Ceriorari Denial and

entered judgment confirming Robinson's conviction and sentence. The District Court did not reach the merits of Robinson's Motion.

Robinson noticed his appeal to the Seventh Circuit and moved for a certificate of appealability. The District Court denied Robinson's motion for a certificate of appealability. He then moved the Seventh Circuit for a certificate of appealability, which the Seventh Circuit granted. The Seventh Circuit granted the certificate on the timeliness issue as well as an ineffective assistance of counsel issue. However, the Seventh Circuit did not address the ineffective claim because it never got passed the timeliness issue.

On appeal to the Seventh Circuit, Robinson argued that his Motion was timely filed within Section 2255's one year statute limitations because he file it within one year of this Court's Rehearing Denial. The Seventh Circuit rejected Robinson's argument, affirming the District Court's dismissal of the Motion as untimely in a decision dated July 29, 2005.

The Seventh Circuit noted that Section 2255 does not define finality It further noted that this Court had not directly addressed the effect of a rehearing procedure on the finality of a conviction for purposes of Section 2255. However, the Seventh Circuit looked to Clay v. United States, 537 U.S. 522 (2003), which did not involve a rehearing petition, and Supreme Court Rule 16.3, which is a non-substantive notification rule, to conclude, in error, that Robinson's convictions was "final" for purposes of Section 2255's one-year statute of limitation

when this Court initially denied his petition for certiorari on direct review, even though Robinson had timely filed a petition for rehearing of that denial. This conclusion is consistent with decisions of this Court, which hold that the denial of a petition for certiorari is qualified until the time for petitioning for rehearing expires See R. Simpson & Co. v. Comm'r of Internal Revenue, 321 U.S. 255 (1944); Flynn v. United States, 75 S.Ct. 285 (1955). As other circuits have found, the logic of these decisions is that, once a petition for rehearing a denial of certiorari is filed, the initial denial of certiorari remains qualified until this Court has disposed of the petition for rehearing, which then becomes the final action of this Court. Thus, a petition for certiorari is not finally denied until the Court resolves any outstanding petition for rehearing. The Seventh Circuit's decision conflicts with this binding Supreme Court precedent insofar as it concluded that Robinson's conviction was final when this Court initially denied certiorari on direct review despite Robinson's timely-filed petition for rehearing.

Robinson now petitions this Court for rehearing.

REASONS FOR GRANTING REHEARING

I. The District Court's Sua Sponte Dismissal Of Robinson's § 2255 Petition For Timeliness, When The Government Did Not Raise The Timeliness Issue, Was Error.

The District Court, sua sponte, dismissed Robinson's

Section 2255 motion on the grounds that it was not timely. The sua sponte dismissals of 2255 petitions, by the District Courts, is an issue that this Supreme Court of the United States has agreed to address. (Day v. Crosby, U.S., No. 04-1324. Eleventh Circuit.) Petitioner ask this Court to hold this motion in abeyance until it decides Day v. Crosby.

The AEDPA's statute of limitations is an affirmative defense, not a jurisdictional defect, which is more appropriately asserted by the Respondent, as required by Rule 12(b), Fed. R. Civ. Proc. rather than by the Court. The District Court, in asserting, sua sponte, an affirmative defense, assumes a burden that is best left to the parties in the case. Indeed, for whatever reason, the Government might choose to waive the affirmative defense the Court asserted here. It would be better to have ordered the Government to respond to Robinson's motion, rather than dismissing the case on statute of limitations grounds. Instead of the neutral and detached role our system of justice assigns to judges, the assertion of an affirmative defense on behalf of one of the parties, abandons the time-honored rile of neutrality, and casts the court in the role of a partisan.

There is a split in the Circuits concerning this issue, thus the reason for this Court granting cert. in Day v. Crosby. Although it is not controlling, the Supreme Court of Illinois has grappled with the same issue under the Illinois Post-conviction Hearing Act. The Supreme Court if Illinois has precluded its trial judges from ruling a timeliness issue sua

sponte. People v. Wright 189 Ill.2d 1, 723 N.E.2d 230 (1999); People v. Boclair, 202 Ill.2d 89 (2002). While these Illinois Supreme Court cases involved the Illinois Post-Conviction Hearing Act, the specific issue the Illinois Supreme Court discussed is relevant here. The Illinois Post-Conviction hearing Act imposes a three-year statute of limitations. Prior to the Illinois Supreme Court's holding in Wright, it was common for Circuit Judges to dismiss Post-Conviction petitions that were untimely. But in Wright, the Supreme Court held this practice to be inappropriate because the time-limit imposed by the statute was not jurisdictional, but was an affirmative defense which had to be raised by the State's Attorney who, the Supreme Court noted, was free to waive the defense, in the same manner as any other affirmative defense may be waived by not pleading it.

Rule 4 of the rules governing § 2255 proceedings provides as follows:

> **(b) Initial consideration by judge.** The motion, together with all the files, records, transcripts, and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the movant to be notified. Otherwise, the judge shall order the United States Attorney to file an answer or other pleading within the period to time fixed by the court or to take such other action as the judge deems appropriate.

Rule 4 reiterates much of what § 2255 itself says. The

relevant portion of 28 U.S.C. § 2255 provides:

> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

28 U.S.C. § 2255 ¶2.

Clearly, these provisions have to do with the question of whether the merits of the § 2255 petition warrant further consideration, a conclusion butressed by the history of § 2255. The one-year statute of limitation did not become a part of § 2255 until April 23, 1996. Rule 4 of the Rules Governing Section 2255 proceedings for the United States District Courts was promulgated in 1977, nearly 20 years before the passage of of the amendments of § 2255, which were embodied in the Anti-Terrorist and Effective Death Penalty Act of 1996, which, as noted, became effective on April 23, 1996.

Consequently, it was error for the District Court to summarily dismiss Robinson's § 2255 motion on a statute of limitations ground without considering the merits of Robinson's claims.

II. Rehearing in the Supreme Court are not to be deemed empty formalities.

Congress did not define when a conviction becomes "final" in the context of a § 2255 proceeding. But Congress is presumed to be familiar with the construction of the word "final" in a post-conviction context. In United States v. Clay, 155 L.Ed.2d 88 (2003), the Court held that a conviction becomes "final"

"when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when time for filing a certiorari petition expires." However, no petition for rehearing had been filed in Clay, so the Court had no reason to consider, and did not consider the effect such a petition would have in its definition of finality. By contrast, here, where Robinson did file a petition for rehearing, the question becomes whether nor not a petition for rehearing is a empty formality.

It is ironic that this petition, petition for rehearing, is concerning a petition for rehearing. A petition for rehearing is the final action that a defendant my take. Final judgement is the final action that this Court may take concerning a particular defendant. Black's Law Dictionary defines "final judgment" as the court's last action that settles the rights of the parties and disposes of all issues in controversy. Thus, rehearings are not to be deemed empty formalities.

The view of the Supreme Court that a conviction is not final until the Supreme Court has denied a petition for rehearing, where, as here, a timely filed petition for rehearing was submitted for the Supreme Court's consideration, is premised upon the fact that where there exists the possibility the conviction could be overturned as a result of some pending action, the conviction is not "final" within the meaning of the term as used in 28 U.S.C. § 2255 §6.

Rehearings are not empty formalities. Although rehearing

in the Supreme Court is not a matter of right, the right to petition for rehearing within 25 days of the denial of the petition for writ of certiorari is a matter of right. R. Simpson and Co. v. Comm'r of Internal Revenue, 88 L.Ed 688 (1944) ("Our rules provide for petitions for rehearing as a matter of right within 25 days after judgment, and this rule has been applied to petitions for rehearings of orders denying certiorari.") In fact, the Supreme Court deems "denials of certiorari as qualified until the 25-day period expires. See Robert L.Stern, Wugene Gressman, Stephen M. Shapiro, and Kenneth S. Geller, Supreme Court Practice. Sec/ 15.4 (8th ed. 2002) ("The Supreme Court's denial of certiorari is 'qualified' and not final until the expiration of the period in which a petition for rehearing is allowed.")

It is inappropriate to apply Rule 16.3 because it is only a notification Rule, the purpose of which is to alert counsel that the 25-day period for petitioning for rehearing under Rule 44.2 has commenced See Hanover Ins. Co. v. United States, 880 F.2d 1503, 1508 (1st Cir. 1989). To view it any differently would be contrary to this Court's holding in Flynn v. United States, 99 L.Ed 1288 (1955). Justice Frankfurter explained:

> A petition for rehearing of a denial of a petition for a writ of certiorari is part of the appellate procedure authorized by the Rules of this Court...The right to such a consideration is not to be deemed an **empty formality** as though such petitions will as a matter of course by denied. This being so, the denial of a petition for certiorari should not be treated as a definitive determination in this Court subject to all the consequences of such an interpretation.

When a petitioner exercises his right to seek rehearing, the practice heretofore observed by this Court is to deem the decision denying certiorari non-final until the decision on the petition for rehearing. Simpson, supra. As an illustration of now non-final the decision may be, in Florida v. Rodriquez, 83 L.Ed.2d 165 (1984), this Court denied certiorari sought by the Florida Attorney General in 1981, yet granted review in 1983, on the timely-filed petition for rehearing. Florida v. Rodriquez, 469 U.S. 1, 11. Final disposition of the appeal occurred four years after the Supreme Court's denial of certiorari.

It is interesting to note that the Court denied certiorari on May 26, 1981. Florida v. Rodriquez, 69 L.Ed.2d 395 (1981). Thereafter, the Attorney General of Florida filed a timely petition for rehearing. The petition remained on the Court's docket for the next two years. On May 23, 1983, the Court entered an order granting the petition for rehearing, reversing the judgment of the Florida Court of Appeals, and remanding the case back to the Florida Court of Appeal for consideration in light of the Supreme Court's opinion in Florida v. Royer, 75 L.Ed2d 229 (1983). It is clear that the petition for rehearing was an integral part of the appellate process, and clearly demonstrates what Justice Frankfurter was saying in Flynn, which is, petitions for rehearing "are not to be deemed empty formalities."

The United States Court of Appeals for the Eight Circuit, in the case of Blair v. Armontrout, 994 F.2d 532 (8th Cir.

1993), discussed the question of whether a petition for rehearing following the denial of a petition for certiorari meant that the decision of the Supreme Court was not final until the timely-filed petition for rehearing was disposed of, held:

> There is little law to guide us. The reasoning in a tax case from the First Circuit is, however, instructive. In that case, the First Circuit held that a tax court decision that was appealed through the federal courts did not become final until the expiration of the rehearing process in the Supreme Court. Hanover Ins. Co. v. United States, 880 F.2d 1503, 1509 (1st Cir. 1989), cert. denied, 107 L.Ed.2d 745 (1990). The case dealt with a statute that provided that tax court decisions become final only '[u]pon the Supreme Court's denial of a petition for certiorari. . . .' 26 U.S.C.§7481(a)(2)(B). The First Circuit interpreted "denial" to be that time when the decision became unalterable, or the expiration of the time for rehearing. Id. at 1508-09. In so ruling, the First Circuit relied on a Supreme Court order in Flynn v. United States, 99 L.Ed 1298 (1955). Justice Frankfurter explained that if the denial of a petition for a writ of certiorari is deemed final action, the rehearing provisions provided for under the Supreme Court Rules would be an 'empty formality.' Id. 75 S.Ct. at 286. Justice Frankfurter held 'the denial of a petition for certiorari should not be treated as a definitive determination in this Court. . . .' Id. 994 F.2d at 533.

History has borne Justice Frankfurter's view out, as noted by this Court's handling of Florida v. Rodriquez, supra.

III. Pro'se litigants are held to less stringent standards than those of experienced attorneys.

Robinson is not an experienced attorney, nor should he be held to the strict standards of experienced attorneys. To hold otherwise, would be contrary to Supreme Court precedent. The Court held, in Haines v. Kerner, 30 L.Ed.2d 652 (1972) that

pro'se litigants are held to less stringent standards than formal pleadings drafted by lawyers , however inartful they may be.

The District Court denied Robinson's § 2255 motion in the basis that it was untimely. The Government did not raise the timeliness issue. And Robinson was never given an opportunity, he was entitled, to supplement his pleadings with a reason for his tardiness.

By sua sponte dismissing Robinson motion, the District Court held Robinson to a standard expected of experienced attorneys. The rules and procedure of federal law are very extensive to say the least. There are many experienced attorneys that are not familiar with all the rules and procedures. To expect a defendant to to be abreast of all the rules and procedures is at odds with this Court's precedent.

A large majority of defendants do not have a high school education upon entering the system. And once in the system, the standard for earning a G.E.D. is bottom-basement-low. Attorneys attend college for many years before they are certified to practice law. The divide between a jail-house G.E.D. and a law degree, is extensive

Most of defendants know that they have one year from the date their conviction becomes final in which to submit a § 2255 motion attacking their sentence or conviction. The average college graduate would define the word "final" to mean that there is nothing left, the end of the road, the ultimate decision ect. In the context of a criminal proceeding, the

average lay-person would think of "final" to mean that there is no further action the Court can take.

Robinson submitted his § 2255 motion within one year after this Court denied his timely motion for rehearing, which is the last action that this Court takes on any proceeding. The District Court, in sua sponte dismissing Robinson's motion, is saying that Robinson should have known that his motion was due one year from the date this Court denied cert., which is an unreasonable burden to place on an inexperienced defendant. Experienced attorneys are at odds about when the starting date begins to run; so one cannot expect a defendant to have the answer to that which attorneys don't have the definite answer.

Robinson was sentenced to awhopping 100-year sentence for the mere possession with intent to deliver 32 grams of cocaine base. A sentence of this magnitude for such a little amount of drugs is unheard of in the history of this Court, or any other court for that matter. Robinson's only chance of lowering this sentence was by way of § 2255 motion. But the same judge who sentenced Robinson to the 100-year sentence, dismissed his motion sua sponte without reaching the merits of his motion. Robinson was not even afforded the opportunity to plead as to why his motion was late. Holding Robinson to such a standard is unreasonable.

CONCLUSION

This Court is the last recourse that Robinson has of attacking a sentence that is, without question, the most unusual

sentence ever given to a defendant for such a small amount of drugs. Murderers, child molesters, gang related crimes, rapist, and even terrorist are not sentenced as severely as Robinson. Sentences of 100 years are reserved for big-time drug offenders, not bottom level addicts supporting their habit. To administer a sentence of 100 years for the conviction of 32 grams of cocaine base, and denying him the opportunity for collateral attack, is unconscionable. Petitioner ask this Honorable Court to allow him his day in court; for the opportunity to be heard. He ask this Court to summarily remand this case back to the District Court in order for his § 2255 motion to be heard on the merits.

Respectfully submitted

Charles R. Robinson, IV

Charles R. Robinson, IV
I.D. #11087-026
P.O. Box 5000
Greenville, Ill. 62246

CERTIFICATE OF SERVICE/DECLARATION

In accordance with 28 U.S.C. § 1746, the undersigned swears under the penalty of perjury the contents of the foregoing motion is in compliance with S.Ct. Rule 44(2). And that the foregoing motion for rehearing is not for delay purposes, but is presented in good faith.

The undersigned also certifies that he did mail a full and correct copy of the foregoing:

PETITION FOR REHEARING

to:

The United States Supreme Court
U.S. Supreme Court Bldg.
One First Street N.E.
Washington, DC 20543

by first class mail, in an envelope addressed as aforesaid, with sufficient first-class postage prepaid and affixed thereto, and by depositing the same in the mail receptacle provided for inmate use in mailing legal materials form the Federal Correctional Institution at Greenville, Illinois, on this 9th day of March, 2003.

Charles R. Robinson IV

Charles R. Robinson, IV
I.D. # 11087-026
P.O. Box 5000
Greenville, Illinois 62246

CERTIFICATE OF SERVICE/DECLARATION

In accordance with 28 U.S.C. § 1746, the undersigned swears under the penalty of perjury the contents of the foregoing motion is in compliance with S.Ct. Rule 44(2). And that the foregoing motion for rehearing is not for delay purposes, but is presented in good faith.

The undersigned also certifies that he did mail a full and correct copy of the foregoing:

PETITION FOR REHEARING

to:

The United States Supreme Court
U.S. Supreme Court Bldg.
One First Street N.E.
Washington, DC 20543

by first class mail, in an envelope addressed as aforesaid, with sufficient first-class postage prepaid and affixed thereto, and by depositing the same in the mail receptacle provided for inmate use in mailing legal materials form the Federal Correctional Institution at Greenville, Illinois, on this 9th day of March, 2003.

Charles R. Robinson, IV
I.D. # 11087-026
P.O. Box 5000
Greenville, Illinois 62246